BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-187
Implementation of Section 402(b)(1)(A)	)	
of the Telecommunications Act of 1996	)	

AMERITECH COMMENTS

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SUMMARY

Section 204(a)(3) requires significant streamlining of the tariffing rules that currently apply to LECs. These provisions should be implemented in a way that is consistent with their plain, common sense meaning. They should also be implemented with reference to Congress' stated intent "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans[.]"[1]

Even before enactment of the 1996 Act, the Commission recognized the need to streamline the tariff requirements associated with price cap regulation of LEC services. Indeed, in the Second Further Notice of Proposed Rulemaking in the LEC price cap performance review proceeding (Second Further Notice),[2] the Commission tentatively concluded that streamlining LEC tariffing requirements in various respects would serve the public interest, regardless of the level of competition for LEC services.[3]

With the enactment of the 1996 Act, the need for streamlining takes on new urgency. As competition for access services accelerates, the need for regulatory scrutiny of LEC tariffs decreases, and the costs associated with the tariff review process increase. These costs of the tariff review process are not borne only by LECs, but also LEC customers, and ultimately end users. They

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1 Joint Statement of Managers, S. Conf Rep. No. 104-230, 104h Cong, 2d Sess. Preamble (1996).

2 Price Cap Performance Review for Local Exchange Carriers, 11 FCC Rcd 858 (1995).

3 Id. at 875.

delay the implementation of pro-consumer price initiatives and new services, and they also distort competition because of their asymmetric application. The Commission must therefore implement section 204(a)(3) in a manner that reflects the dramatic changes that will be effected by section 251.

Specifically, the Commission should revise its tariff rules and policies governing LEC tariffs in the following principal respects. First, the Commission must allow LEC tariffs to take effect on seven or fifteen days' notice, unless it takes action under section 204(a)(1); it may no longer defer LEC tariffs pursuant to section 203(b)(2). Second, consistent with the proviso in section 204(a)(3) that LEC tariffs be deemed lawful, the Commission should make clear that tariffs filed pursuant to section 204(a)(3) carry a strong presumption of lawfulness. Third, the Commission should affirm its tentative conclusion that section 204(a)(3) applies to new or revised charges, classifications, regulations, or practices, and not just to price increases or decreases. The Commission should not, however, limit application of this provision to existing services. Fourth, the Commission should conduct only limited pre-effective review of rate increases, decreases, and restructures that are within price cap indices, as well as of new services that are voluntarily initiated by a LEC. Fifth, the Commission should routinely impose protective orders when LECs file confidential information with their tariffs and should adopt procedures to facilitate the use of protective orders. Sixth, the Commission should treat annual filings like any other filings for purposes of section 204(a)(3). To facilitate the Commission's review of such filings, price cap LECs should be required to file a modified version of today's tariff review plan (TRP), for price cap baskets other than the common line basket, fifteen days prior to the annual filing. Seventh, the Commission

should adopt an electronic filing system for tariff transmittals that can accommodate multiple platforms and software packages.

Finally, while welcoming a streamlining of current tariff requirements, Ameritech urges the Commission to begin the process of establishing an entirely new regulatory framework for regulation of all LECs. In particular, the Commission must replace its Competitive Carrier framework, which is now more than fifteen years old, with a new framework that reflects the changed regulatory environment and the realities of today's marketplace. No longer is a framework that accords virtually unlimited flexibility to one sector of the industry and strict scrutiny to another sustainable or in the public interest.

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AMERITECH COMMENTS

The Ameritech Operating Companies (Ameritech) respectfully submit the following comments in response to the Notice of Proposed Rulemaking (Notice) in the above-captioned proceeding. In the Notice, the Commission seeks comment on how best to implement section 204(a)(3) of the Telecommunications Act of 1996 (the Act), which provides for streamlined tariff filings by local exchange carriers (LECs). The Commission also invites comment on whether it should make additional modifications to its tariff filing rules and procedures to advance the broader goals of the 1996 Act.

As discussed below, Ameritech believes that section 204(a)(3) requires significant streamlining of the tariffing rules that currently apply to LECs. The provision requires unequivocally that "[a] local exchange carrier may file with the Commission a new or revised charge, classification, regulation or practice on a streamlined basis." It provides further that: (1) any such charge, classification, regulation, or practice shall be deemed lawful, and (2) rate decreases and increases shall be effective on 7 and 15 days, respectively, unless the Commission suspends or rejects the filing under section 204(a)(1). These provisions should be implemented in a way that is consistent with their plain, common sense meaning. They should also be implemented with

reference to Congress' stated intent "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans[.]"[1]

Prompt and significant streamlining of LEC tariff requirements is not just a statutory requirement, but a public policy imperative. Even before enactment of the 1996 Act, the Commission recognized the need to streamline the tariff requirements associated with price cap regulation of LEC services. Indeed, in the Second Further Notice of Proposed Rulemaking in the LEC price cap performance review proceeding (Second Further Notice),[2] the Commission tentatively concluded that streamlining LEC tariffing requirements in various respects would serve the public interest, regardless of the level of competition for LEC services.[3]

With the enactment of the 1996 Act, the need for streamlining takes on new urgency. As competition for access services accelerates, the need for regulatory scrutiny of LEC tariffs decreases, and the costs associated with the tariff review process increase. These costs of the tariff review process are not borne only by LECs, but also LEC customers, and ultimately end users. They delay the implementation of pro-consumer price initiatives and new services, and they also distort competition because of their asymmetric application.

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The Commission must implement section 204(a)(3) in a manner that reflects the dramatic changes that will be effected by section 251.

Specifically, the Commission should revise its rules and procedures for LEC tariffs in the following principal respects. First, the Commission must allow LEC tariffs to take effect on seven or fifteen days' notice, unless it takes action under section 204(a)(1); it may no longer defer LEC tariffs pursuant to section 203(b)(2). Second, consistent with the proviso in section 204(a)(3) that LEC tariffs be deemed lawful, the Commission should make clear that tariffs filed pursuant to section 204(a)(3) bear a strong presumption of lawfulness. Third, the Commission should affirm its tentative conclusion that section 204(a)(3) applies to new or revised charges, classifications, regulations, or practices, and not just to price increases or decreases. The Commission should not, however, limit application of this provision to existing services. That limitation would be at odds with the language of the Act and sound public policy. Fourth, the Commission should conduct only limited pre-effective review of rate increases, decreases, and restructures that are within price cap indices, as well as of new services that are voluntarily initiated by a local exchange carrier, rather than mandated by the Commission. Pre-effective review of such filings should be limited to an examination of whether the tariff is on its face clearly unlawful. Fifth, the Commission should adopt its proposal to routinely impose protective orders when LECs file confidential information with their tariffs, and the Commission should adopt procedures to facilitate the use of protective orders. Sixth, the Commission should treat annual filings like any other filings for purposes of section 204(a)(3). To facilitate the Commission's review of such filings, LECs should be required to file a modified version of today's tariff review plan

(TRP), for price cap baskets other than the common line basket, fifteen days prior to the annual filing. The modified TRP would provide the following information: (1) existing and proposed price cap indices (PCI) for each price cap basket; (2) proposed upper and lower bounds for service band indices; and (3) a description of an exogenous cost adjustments to the PCI. Seventh, the Commission should adopt an electronic filing system for tariff transmittals that can accommodate multiple platforms and software packages.

Finally, while welcoming a streamlining of current tariff requirements, Ameritech urges the Commission to begin the process of establishing an entirely new regulatory framework for regulation of all LECs. In particular, the Commission must replace its Competitive Carrier framework, which is now more than fifteen years old, with a new framework that reflects the changed regulatory environment and the realities of today's marketplace. No longer is a framework that accords virtually unlimited flexibility to one sector of the industry and strict scrutiny to another sustainable or in the public interest.

The Commission experienced first-hand the difficulty of perpetuating this framework in the context of the interexchange marketplace. There, the Commission struggled for years with Tariff 12, Tariff 15 and other types of filings that "pushed the envelope" because its core regulatory framework did not permit AT&T the same flexibility to respond to the demands of the marketplace enjoyed by its competitors. The Commission struggled with these issues because, instead of eliminating its Competitive Carrier rules in favor of a more up-to-date regulatory framework, it sought to operate within the confines of that antiquated framework. The Commission should not

make this same mistake twice. Particularly, in light of the changes that will be ushered in by the 1996 Act, the old "dominant/nondominant" classifications are no longer sustainable. They should be replaced by regulatory policies that apply equally to all and that reflect the new world we are about to enter.

I. The Commission May Not Defer Tariffs Filed Pursuant to Section 204(a)(3)

In the Notice, the Commission tentatively concludes that Congress intended to preclude the Commission from deferring up to 120 days the effective date of LEC tariffs filed pursuant to section 204(a)(3). This tentative conclusion is correct and should be adopted.

Section 204(a)(3) provides that LEC tariffs "shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) [*i.e.*, section 204(a)(1)] before the end of that 7-day or 15-day period as appropriate. The Commission's authority to defer tariffs derives not from section 204(a)(1), but from section 203(b)(2).[4] Therefore, section 204(a)(3) by its terms prohibits the Commission from deferring streamlined LEC tariffs.

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4 Section 203(b)(2) provides that the Commission may modify the requirements of section 203 in its discretion and for good cause, but that it may not require the notice period for tariffs filed pursuant to section 203(b)(1) to exceed 120 days.

II. Tariffs Filed Pursuant to Section 204(a)(3) are Presumptively Lawful

The Commission also seeks comment on the meaning of the term "deemed lawful." The Commission offers two interpretations for consideration. These interpretations vary, depending upon whether the directive that LEC tariffs shall be deemed lawful stands by itself or is qualified by the proviso, "unless the Commission takes action under paragraph (1)." Stated differently, the meaning of "deemed lawful" turns on whether the clause "unless the Commission takes action under paragraph (1) . . . " qualifies only the phrase that immediately precedes that clause -- *i.e.*, the phrase "shall be effective [within 7 or 15 days]," -- (in which case "deemed lawful" stands by itself), or the phrase "shall be deemed lawful and shall be effective [within 7 or 15 days]." In the first instance, the Commission suggests, the term "deemed lawful" would "establish higher burdens for suspension and investigation, such as by 'presuming' LEC tariffs 'lawful." In the latter, the term would merely change the legal status of LEC tariffs that become effective without suspension and investigation, precluding the Commission from awarding damages for the period that a streamlined tariff is in effect prior to any determination that it is unlawful.

Ameritech submits that the first interpretation is correct and should be adopted. First, it is the interpretation that is required by basic principles of statutory construction. Specifically, it is a well-established rule of statutory construction that, absent a clear indication to the contrary in a statute, qualifying words or phrases refer only to the last antecedent. As stated in Sutherland Statutory Construction:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it.[5]

Section 204(a)(3) has two antecedents preceding the qualifying phrase ("unless the Commission takes action . . ."): (i) the "deemed lawful" phrase, and (ii) the "shall be effective . . . " phrase. According to the rule of construction, the qualifying phrase modifies only the immediately antecedent phrase -- the "shall be effective . . . " phrase.

Second, this interpretation is the only one that makes sense. When Congress said that LEC tariffs shall be deemed lawful, Congress presumably meant just that. In contrast, under the second interpretation -- under which a tariff would be deemed lawful only if it were not suspended and investigated -- it is not entirely clear that the "deemed lawful" language would have any meaning or effect at all. While the Commission suggests that, under this view, the *Arizona Grocery*[6] doctrine would apply, thereby altering the damages remedy associated with unlawful tariffs, the Commission acknowledges that applying *Arizona Grocery* in this context would represent

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5 2A Norman J. Singer, Sutherland Statutory Construction, § 47.33. See also *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 832 -33 (9th Cir. 1996); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1985) (calling the "last antecedent rule" as "a fundamental rule of statutory construction). Sutherland and the courts both recognize that if a comma separates the two antecedents from the qualifying phrase, that may signify that both antecedents are qualified by the qualifying phrase. For example, in *Johnson v. S.E.C.*, 87 F.3d 484, 488 (D.C. Cir. 1996), the court declined to apply the rule of the last antecedent to a provision that referred to "any penalty or forfeiture, pecuniary or otherwise" because the presence of a comma suggested that the qualifying phrase should be applied to the entire list of antecedents.

6 *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932).

something of an expansion of that doctrine to a new context.[7] Surely if Congress' only intent was to alter the damages remedy for tariffs allowed to go into effect, it would have so indicated in a more clear and direct fashion.

Construing section 204(a)(3) to attach a presumption of lawfulness of LEC tariffs is also consistent with longstanding precedent associated with streamlined tariff requirements. Historically, streamlined regulation has encompassed not only a reduction in the notice requirements, but also a presumption of lawfulness. For example, when the Commission streamlined its regulation of certain AT&T services prior to declaring AT&T nondominant, it reduced the tariff filing requirement for those services to fourteen days, eliminated cost support requirements, and attached a presumption of lawfulness to the streamlined tariffs. Likewise, the Commission treats non-dominant carrier tariff filings as prima facie lawful and will suspend them only on a showing that: (a) there is a high probability the tariff would be found unlawful after investigation; (b) any unreasonable rate could not be corrected in a subsequent proceeding; (c) irreparable injury will result if the tariff filing is not suspended; and (d) the suspension would not otherwise be contrary to the public interest. Even in the context of price cap regulation, a presumption of lawfulness is accorded LEC rates that conform to price cap indices and service bands. Indeed, Ameritech is aware of

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7 In *Arizona Grocery* , the United States Supreme Court held that a shipper that charged rates below the maximum ceiling established by the Interstate Commerce Commission (ICC) could not be liable for damages when its rate was subsequently found unlawful. The Court reasoned that in prescribing a maximum rate, the ICC had performed a legislative function, upon which shippers had a right to rely, and it could not subject them to liability for complying with that order. Here, the Commission suggests that the statutory directive that LEC rates be "deemed lawful" if not suspended would be equivalent to the ICC's prescription of rate ceilings. That well may be, but, considering the different circumstances presented in *Arizona Grocery*, it would seem that if this change in damages were Congress' primary intent, it would have said so more directly.

no instance in which streamlined tariff regulation has not included a presumption of lawfulness. That is because the benefits of streamlining would be illusory without a presumption of lawfulness: the shorter notice periods would be of little practical significance if the Commission could routinely suspend and investigate the affected tariffs. The Commission must assume that Congress was aware of this practice and had it in mind when it required the Commission to streamline its regulation of LEC tariffs.[8]

The only logical conclusion is that Congress intended that the term "deemed lawful" be construed in accordance with its ordinary meaning and in a manner consistent with the Commission's treatment of streamlined tariffs in the past. The ordinary meaning of the word "deem" is to "consider" or "treat as if."[9] Thus, section 204(a)(3) arguably establishes more than just a presumption of lawfulness for LEC tariffs, instead providing that such tariffs will be considered or treated as if lawful. To this extent, BellSouth may be correct in arguing that section 204(a)(3) extends to all LEC filings the same strong presumption of lawfulness currently extended to non-dominant carrier tariffs under section 1.773.[10] Regardless, however, of whether the presumption of lawfulness accorded LEC tariffs is the identical presumption accorded non-dominant carrier tariffs, clearly section 204(a)(3) establishes a strong presumption of lawfulness. This is its plain meaning.

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8 *Foti v. INS* , 375 U.S. 217, 223 (1963)("[i]t must be assumed that Congress knew of this familiar administrative practice and had it in mind when it enacted [the statutory provision])."; *Steadman v. SEC*, 450 U.S. 91, 103 (1981); *Lukhard v. Reed*, 481 U.S. 368, 378-79 (1987) (plurality opinion).

9 See Black's Law Dictionary, which defines "deem" as: "to hold; consider; adjudge; believe; condemn; determine; treat as if; construe." Blacks's Law Dictionary, 374 (5th ed. 1981).

10 See Notice at note 32.

III. Section 204(a)(3) Applies to Any New or Revised Charge, Classification, Regulation, or Practice

The Commission also seeks comment on the types of filings to which section 204(a)(3) applies. The Commission tentatively concludes that all LEC tariff filings that involve changes to the rates, terms and conditions of existing service offerings are eligible for streamlined treatment. The Commission suggests, however, that section 204(a)(3) could be read to apply only to new or revised charges, classifications, or practices that are associated with existing services. The Commission states that such a limitation may be preferable as a matter of policy because it would permit the Commission and interested parties a fuller opportunity to review tariff changes that are more likely to raise sensitive pricing issues than revisions to services that have already been subject to review.

Ameritech agrees that section 204(a)(3) applies not only to rate increases and decreases, but, more broadly, to new or revised charges, classifications, regulations, or practices. While Congress specified the advance notice requirement only for price increases and decreases, it made clear that streamlined regulation should apply not only to increases and decreases, but also to new services, restructures, and changes in classifications, regulations, or practices. In this regard, the first sentence of section 204(a)(3) is unequivocal: it provides that "LECs may file a new or revised charge, classification, regulation, or practice on a streamlined basis."

Ameritech strongly disagrees, however, both as a matter of law and policy, with the Commission's suggestion that this language may be limited

to existing services. If Congress had intended to streamline only the charges, classifications, etc. associated with existing offerings, it would have said so. It did not. On the contrary, section 204(a)(3) applies, without limitation, to "a new or revised charge, classification, regulation, or practice."

Moreover, the Commission's stated policy preference is at odds with the Commission's own prior pronouncements with respect to new services. The rules for filing new services under price caps have changed several times and have only become more complicated and restrictive, despite the fact that simplification of regulation was one of the Commission's justifications for adopting price caps in the first instance.[11] For this reason, the Commission expressed concern in the Second Further Notice in the price cap performance review proceeding that its rules governing new services stifle innovation: "We are concerned about the delay and burden that our current rules may cause in introducing new services. . . . We are concerned that the current system may hinder the introduction of services, a result that is harmful to customers and competition."[12] Consistent with these observations, the Commission proposed to reduce the filing requirements for certain new

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11 Today, new services are subject to the "flexible" cost-based approach articulated in the Commission's order in the Part 69 ONA proceeding. Under this approach, LECs are required to describe and justify overhead loadings and are permitted to include a risk premium only if they can "provide evidence of comparably risky undertakings by firms in relevant industries, together with the cost of capital associated with the undertakings." See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, and Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 and 87-313, Report and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, FCC 91-186 (released July 11, 1991) at paras. 42-44.

12 Second Further Notice at 876-77. See also Price Cap Performance Review for Local Exchange Carriers, First Report and Order, 10 FCC Rcd 8961, 9135 (1995).

services to fourteen days and to reduce the amount of cost support required for such filings.[13]

Given that the Commission itself recognized -- even before enactment of the 1996 Act -- that its new services rules warrant streamlining, Ameritech is baffled as to why the Commission suggests a policy preference for excluding new services from the scope of section 204(a)(3). While Ameritech could understand the Commission's reluctance to streamline a mandated service, such as expanded interconnection, upon which LEC competitors depend, to deny LECs any streamlined regulation of any new service would, to use an apt cliché, "throw out the baby with the bath water."

The vast majority of new services have been and will continue to be optional services that LECs deploy to compete more effectively in the marketplace.[14] If LECs wish to sell these services, they must do so at a price that customers perceive to be reasonable; otherwise customers will not purchase them. But even assuming arguendo that a LEC attempted to overcharge for the service, consumers would be no worse off than they were before the introduction of the service, since, by definition, new services merely add to customers' options. Since the service is optional, the LEC has

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13 The Commission offered two proposals for determining which new services would be subject to streamlined review. Under one option, the Commission would deny streamlined treatment to certain categories of new services, such as those the Commission requires LECs to offer, such as expanded interconnection services. Under the second option, LECs would have to demonstrate that competitive circumstances warranted relaxed regulatory relief. Id at 880-81.

14 In light of the interconnection provisions of the 1996 Act, it is questionable whether the Commission will ever again need to require LECs to provide a new service. The Act establishes a new vehicle -- section 251 -- to ensure that telecommunications markets are open to competition. It will thus no longer be necessary for the Commission to ensure openness of LEC networks through mandated tariffed offerings.

no undue market power to force its customers to pay more for the service than the amount those customers perceive to be the value of the service.[15] Therefore, detailed regulatory scrutiny of new services is not needed.

IV. The Commission Should Forego Pre-Effective Review of Certain Types of Tariff Filings

In paragraphs 23 and 24 of the Notice, the Commission seeks comment on whether it can and should rely exclusively on post-effective tariff review of certain types of tariff filings to police LEC compliance with Title II of the Communications Act. The Commission states that, under this approach, instead of reviewing LEC tariff filings before they become effective, the Commission would review these tariffs after their effective date and at that time determine whether it is necessary to initiate a tariff investigation pursuant to section 205 of the Act. The Commission also asks whether, in the event it adopts such a policy, it should retain discretion to conduct a pre-effective review in individual cases.

Ameritech opposes the Commission's proposal insofar as it suggests the Commission would conduct a full review of LEC tariffs after their effective date. If that is the Commission's intent, this proposal would be inconsistent with the streamlining mandated by Congress. Instead of having the assurance that its tariff had been considered and found not unlawful, a LEC would be left in limbo: its tariff would be in effect, but the status of the

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15 This is true regardless of whether competitive alternatives exist. That is, in part, why the federal government grants patents to innovators which effectively confer on them a monopoly on the new product they have developed: If the patent-holder charges too much for the new product, customers will not buy it. The other principal reason behind the grant of patents is that they encourage innovation.

tariff would be uncertain. Indeed, with no time limit by which the Commission would have to complete its post-effective tariff review, this uncertainty could drag on for a considerable length of time. Customers demand certainty. LECs cannot compete viably if they cannot provide customers with at least some assurance that the terms and conditions of a service offering are not unlawful.

While Ameritech thus opposes a policy of relying primarily on post-effective tariff review, Ameritech urges the Commission to conduct only limited pre-effective review of certain types of tariff filings. Specifically, Ameritech urges the Commission to conduct only limited pre-effective review of: (1) rate increases or decreases that fall within the applicable price cap indices; (2) rate restructures that fall within the applicable price cap indices; and (3) voluntarily-filed new services. These filings should rarely, if ever, be unlawful, and the section 208 complaint process (and, in rare instances, the Commission's section 205 authority) provides more than sufficient protection against unlawful rates, terms, and conditions. Therefore, pre-effective review of these filings should be limited to confirming that they fall within one of the three categories listed above and that they are on their face patently unlawful. Otherwise, these filings should be allowed to go into effect with the same presumption of lawfulness accorded nondominant carrier filings. As discussed below, the Commission has authority to limit its pre-effective review of such filings in this manner, and there are compelling public policy reasons for it to do so.

In asking whether it has legal authority to forego pre-effective review of certain LEC tariffs, the Commission questions whether that would be

consistent with section 204(a) of the Act, which provides that when a tariff is filed, the Commission "may" upon complaint or its own initiative suspend and investigate the tariff. The Commission has already answered this question. In adopting a one-day notice period for non-dominant carrier tariff filings, the Commission found that it had legal authority to do so even though that would preclude pre-effective review of tariffs.[16] The Commission's analysis of the issue in the Notice of Proposed Rulemaking is directly on point:

> We recognize that in proposing a one day notice period for nondominant carriers, we would effectively eliminate pre-effective tariff review. We note, however, that Section 204 of the Act states that "the Commission may . . . enter upon a hearing concerning the lawfulness [of a filed tariff] . . ." The appearance of the word "may" throughout this section of the Act is a strong indication that Congress intended the Commission to have discretion to refrain from pre-effective tariff review where it would not serve the public interest.[17]

Since section 204(a) applies equally to all carriers -- dominant and nondominant -- the Commission's analysis applies as much to LEC tariffs as it does nondominant carrier tariffs.[18]

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16 Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752 (1993) at paras. 23-24.

17 Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking, 8 FCC Rcd 1395 (1993) at para. 18 (emphasis in original).

18 Even if the Commission concluded that section 204(a) precluded it from foregoing advance review of LEC tariffs, the Commission could forbear from applying the provisions in section 204(a) that precluded advance review. See 47 U.S.C.§ 160. The Commission's forbearance authority is limited only with respect to sections 251(c) and 271 of the Act.

Foregoing pre-effective review of certain filings would also be in the public interest. The Commission already accords a presumption of lawfulness to rate increases or decreases that fall within the applicable price cap indices. LECs are permitted to file those tariffs without cost support and on a streamlined basis. The Commission rarely, if ever, suspends such tariffs; thus there is little, if any need for pre-effective review of them. Instead, as is the case with nondominant carrier filings, the complaint process provides adequate protection against the extremely remote possibility of unlawful rates.

For similar reasons, pre-effective review of restructures involving in-band rate changes is unnecessary. In essence, an in-band rate restructure is nothing more than a specific type of in-band filing. There is no public policy reason to treat such filings differently from other in-band filings. In fact, the Commission recognized this in the Second Further Notice in the Price Cap Performance Review proceeding. There, the Commission suggested that the danger of unreasonably high restructured rates has become less likely since the inception of price caps, and proposed to shorten the notice period for such filings to 15 days for rate increases and 7 days for rate decreases.[19]

Finally, pre-effective review of voluntarily-filed new service tariffs is unnecessary.[20] As Ameritech explained above, LECs have every incentive to price new services that they voluntarily introduce at rates perceived by

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19 Second Further Notice at para. 51.

20 In all of the Ameritech states, various types of new service filings are allowed to go into effect without advance review. In Michigan most new service filings do not require cost support. In other Ameritech states, cost support is used for the limited purpose of showing that new services are not priced below cost.

customers to be reasonable. If they do not, customers will not purchase those services; instead, they will continue to use their existing services. In this respect, regardless of the level of competition faced by the LEC, market forces will dictate the prices of voluntarily-filed new services. Of course, as competition for access services accelerates, spurred on by the Commission's expanded interconnection rules and the 1996 Act, LECs will have all the more incentive to price their new services competitively.

More importantly, insofar as new services, by definition, add to the range of options available to customers, there is absolutely no reason to scrutinize new service filings prior to the time they go into effect. In fact, to the extent the Commission holds up the introduction of new services pending scrutiny of their rates, terms, and conditions, the public is necessarily harmed. Even if the rate is ultimately found to be too high, customers would be better off at least having the option of purchasing the service at that rate, than having no option to purchase it at all. Likewise, there is no reason to determine whether a rate is too low prior to its effective date. The only legitimate public policy concern with respect to whether rates are too low is whether they are predatory, and it is now well-established that successful predatory pricing is a virtual impossibility.[21] Thus, even if the rate were ultimately found to be too low, the only consequence would be that customers would enjoy the windfall of a temporary price break.[22]

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21 *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful").

22 Even below-cost pricing does not harm consumers unless it enables a carrier to drive its competitors from the marketplace and keep them out. As the United States Supreme said: "Without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation

Ameritech, therefore, urges the Commission to limit pre-effective review of in-band rate increases, decreases, and restructures and voluntarily-filed new services to ensuring that such filings are not on their face patently unlawful. This approach would be consistent with the specific intent of section 204(a)(3) and Congress' broader intent to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans[.]" It would eliminate unnecessary regulation only of tariffs that are almost certainly lawful in any case, and it would encourage the deployment of advanced services and technologies.

V. The Commission Should Establish Procedures to Protect Proprietary Cost Support and Other Confidential Information Filed With Tariffs

Noting that it regularly receives requests by carriers for confidential treatment of cost data filed with tariff transmittals and that it will be impossible to resolve these requests within the 7 or 15 day tariff review period established by the 1996 Act, the Commission asks whether it should routinely impose a standard protective order whenever a carrier claims in good faith that information qualifies as confidential under relevant Commission precedent. Ameritech's answer is two-fold.

First, the Commission should eliminate cost support requirements to the extent those requirements are no longer necessary. The Commission proposed some changes in this regard in the Second Further Notice in the

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is in general a boon to consumers." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2588 (1993).

Price Cap Performance Review proceeding. For example, the Commission proposed to exclude alternative pricing plans (APPs) from the definition of new services, thereby exempting those filings from the cost support requirements that apply to new services.[23] The Commission should not only adopt this proposal, but eliminate cost support requirements for all new services that are voluntarily filed, not just ones that fit the definition of an APP. As discussed above, if the new service is not mandated by the Commission, then the market will constrain a LEC's ability to extract more than a reasonable price for the service, and there is no risk that consumers will be harmed anyway, since the new service only adds to their options. Moreover, the cost support associated with new service filings more often than not represents a flash-point for LEC competitors to fight competition in the regulatory arena rather than the marketplace. The resulting delays and uncertainty increase business risk and discourage the introduction of innovative new services. Ultimately, there is no reason why LECs should not be permitted to price new services in the same manner that other carriers do -- based on their value in the marketplace, as opposed to their cost. The Commission can still scrutinize cost data in an investigation as necessary. But to require that voluntarily filed new services all be cost-justified constitutes regulatory overkill that stifles innovation and harms consumers.

Second, to the extent the Commission retains cost support requirements for LEC tariffed offerings, it must allow for the protection of confidential cost and other proprietary information submitted with LEC

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23 Second Further Notice, supra at para. 20. The Commission defines an alternative pricing plan as an optional different rate, term or condition applied to a service that is functionally indistinguishable from an existing service and which customers can self-select. An example of an APP is a volume or term discount.

tariffs. As the Commission and courts have recognized, this information is quintessentially proprietary, the disclosure of which can place LECs at a significant, unfair competitive disadvantage.[24] Moreover, the Commission must permit LECs to protect confidential information without delaying the effective date of their tariffs or otherwise compromising their right to streamlined treatment of tariff filings.

The Commission's proposal to routinely impose a standard protective order whenever a carrier claims in good faith that information qualifies as confidential under relevant Commission precedent could, if implemented properly, meet these requirements. At the same time, it would accommodate the interest of interested parties to secure prompt access to cost support submitted with LEC tariff filings. As the Commission has recognized:

> [R]elease of confidential information under a protective order or agreement can often serve to resolve the conflict between safeguarding competitively sensitive information and allowing interested parties the opportunity to fully respond to assertions put forth by the submitter of confidential information.[25]

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24 See, e.g. Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 5058 (1991) at para. 13 ("Cost data and other information that would reveal a company's profit margins have been recognized by the courts as a category of information with considerable competitive implications. Disclosure of profit margins carriers the obvious risk of enabling parties to underbid or under price their competitors. It is "virtually axiomatic" that disclosure of detailed financial data showing costs and revenues would, in normal competitive markets, be likely to enable a competitor to gain substantial and unwarranted advantage." Citations omitted). See also *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979); *Braintree Electric Light Dept. v. Department of Energy*, 494 F. Supp. 287 (D. D.C. 1980);*Timken Co. v. U.S. Customer Service*, 491 F. Supp. 557 (D. D.C. 1980).

25 Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Notice of Proposed Rulemaking, GC Docket No. 96-55, FCC 96-109, released March 25, 1996 at para. 36.